Supreme Court, U.S.
FILED

97 2051 JUN 17 1998

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1997

DENISE GRAFF,

Petitioner,

vs.

V&M ERECTORS, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM R. AMLONG
Counsel of Record
JENNIFER J. ATOR
AMLONG & AMLONG, P.A.
Attorneys for Petitioner
500 Northeast Fourth Street
Second Floor
Ft. Lauderdale, FL 33301
(954) 462-1983

35 pp

QUESTION PRESENTED FOR REVIEW

In a hostile-environment employment discrimination case, to whom must a plaintiff complain in order to impose respondeat superior liability on the employer?

LIST OF PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed here include those who appear in the caption of the case. There is no parent or subsidiary of any party to be listed.

TABLE OF CONTENTS

Page

Question Presented i

List of Parties ii

Table of Contents iii

Table of Cited Authorities iv

Opinions Below 2

Statement of Jurisdiction 2

Statute Involved 2

Statement of the Case 3

Reason for Granting the Writ 5

The decision below conflicts with the decision of at least one other United States court of appeals on the issue of how the negligence principles should be applied in hostile environment sexual harassment cases 5

Conclusion 12

TABLE OF CITED AUTHORITIES

Cases:

Bonenberger v. Plymouth Township,
132 F.3d 20 (3rd Cir. 1997) 6

Harris v. Forklift Systems, Inc.,
510 U.S. 17 (1993) 9

Huddleston v. Roger Dean Chevrolet, Inc.,
845 F.2d 900 (11th Cir. 1988) 6

Kilgore v. Thompson & Brock Management, Inc.,
93 F.3d 752 (11th Cir. 1996) 6

Torres v. Pisano,
116 F.3d 625 (2nd Cir. 1997) 6

Young v. Bayer Corp.,
123 F. 3d 672 (7th Cir. 1997) 6, 10

Statute:

Title VII of the Civil Rights Act of 1964,
as amended, 42 U.S.C. § 2000e, *et seq.* 2-3

Miscellaneous:

BUREAU OF THE CENSUS, U.S. DEP'T. OF COMM., 1992 ENTERPRISE STATISTICS, COMPANY SUMMARY 9 (1997) 8

EEOC Policy Guidance on Sexual Harassment, 8 Fair Employment Practices Manual (BNA), at 405:6699-6700 9

Vicki Schultz,
Reconceptualizing Sexual Harassment, 107 Yale L.J. 1683 (Spring 1998) 9

APPENDIX

Appendix A — Order of The United States Court of Appeals For The Eleventh Circuit, Denying Petition For Rehearing And Rehearing En Banc, Dated February 11, 1998 ..... 1a

Appendix B — Opinion of the United States Court of Appeals for the Eleventh Circuit Dated December 15, 1997 ..... 3a

Appendix C — Memorandum of Decision and Order of the United States District Court for the Southern District of Florida Dated March 19, 1997 .... 5a

No.

In The

Supreme Court of the United States

October Term, 1997

DENISE GRAFF,

Petitioner,

vs.

V&M ERECTORS, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Denise Graff, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported, other than in table form at 132 F.3d 1461 (11th Cir. 1997) and 136 F.3d 1333 (11th Cir. 1998) (*en banc*). The opinion is reproduced in the Appendix ("App.") at 3a and 1a (*en banc*). The opinion of the district court is unreported, but is reproduced at 5a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on December 15, 1997. Rehearing and rehearing *en banc* were denied February 10, 1998. This Court, through Justice Kennedy, on May 8, 1998, enlarged until June 17, 1998 the time within which for Graff to file her petition for certiorari.

STATUTE INVOLVED IN THIS CASE

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, (Title VII), is set forth below:

> § 2000e-2. Unlawful employment practices
>
> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer —
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

> individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. . . .

STATEMENT OF THE CASE

I. Facts

Almost immediately after Denise Graff began working with V & M Erectors as an apprentice iron worker, David Sargent, her foreman, evidenced an "anti-female" attitude, refusing to train her and telling crew members that he did not want her on "his crew." To force her to quit, Sargent intentionally endangered Graff, requiring her to lift enormous amounts of weight and to tie an iron column during a thunder storm. Her option was to "go home." After Graff complained to Jimmy Sutton, the superintendent, about Sargent's behavior, the situation worsened. Ray Sargent, David's brother, added to the harassment graphic sexual comments and groping of Graff's breasts and buttocks. Graff went to V & M's office and complained to the owner's daughter. Nothing was done. Following a second complaint to Sutton, Sutton ineffectually told the Sargents to stop.

Graff demanded, after Ray Sargent threatened to rape her, to speak to Vern Nix, president of the 60-employee company. Sutton told Graff that she could not

speak to Nix until sometime the following week. Graff tried to telephone Nix, but not could reach him. Although Nix, when he learned from Sutton what was happening, ordered Graff and the Sargents separated, the Sargents followed Graff to her new job site and continued the harassment. During a five-minute meeting the next week, Nix cut Graff off and told her to stop crying. She then began a vacation from which she never returned.

II. Procedural background

Graff sued, alleging violation of Title VII of the Civil Rights Act of 1964, as amended, (Count I) as well as of the parallel Florida Civil Rights Act of 1992 (Count II). She also asserted common law claims for negligent training, supervision and retention (Count III), intentional infliction of emotional distress (Count IV), and battery (Count V). V & M moved for summary judgment, which Graff opposed.

The district court on March 19, 1997, granted the motion for summary judgment as to Counts I and II, dismissing each with prejudice, and dismissed the other supplemental state-law claims without prejudice. The district court found "little help" from circuit precedent that required reporting of hostile-environment employment discrimination to "higher management," Appendix at 13a, because "[t]he closeness and informal operation of V & M distinguishes it from any of the Eleventh Circuit cases cited above." *Id.* The district court then set out essentially to craft a small-business standard for notice to employers of hostile-environment employment discrimination. The district court held that, in a situation such as the one at bar, the only notice to the corporate employer that imposes any duty on the corporation to act would be notice to someone with the

power to fire the offending actor: "Stern reprimands are no substitutes for pink slips." Appendix at 14(a).

Petitioner filed a notice of appeal April 1, 1997. The Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 to review the district court's final decision.

The Court of Appeals for the Eleventh Circuit affirmed the district court per curiam December 15, 1997, "based on the district court's well-reasoned order," following which petitioner moved for rehearing January 2, 1998 and suggested rehearing en banc. The Court of Appeals denied rehearing and rehearing en banc by order dated February 11, 1998.

This Court, through Justice Kennedy, on May 8, 1998, enlarged until June 17 the time within which for Graff to file her petition for certiorari.

REASON FOR GRANTING THE WRIT.

The decision below conflicts with the decision of at least one other United States court of appeals on the issue of how the negligence principles should be applied in hostile environment sexual harassment cases.

The Court should grant the petition for a writ of certiorari to establish uniformity among the circuits in the application of the doctrine of *respondeat superior* in the area of sexual harassment cases.

The circuits are in conflict. Division exists between the Eleventh Circuit, which insists that notice be made to

"higher management,"[1] and the Seventh Circuit, which has held that it is sufficient for a sexual harassment victim to give notice "to someone who could reasonably be expected to refer the complaint up the ladder to the employee authorized to act on it."[2] Although the Eleventh Circuit-Seventh Circuit dichotomy is the most crystalized, two other circuits have positioned themselves similarly to the Court of Appeals for the Seventh Circuit.[3]

By affirming the district court's grant of summary judgment based on the district court's discussion, the Court of Appeals for the Eleventh Circuit has endorsed, for small businesses, such as respondent, what essentially is a "highest management" standard. After rejecting the court of appeals analysis in several cases involving larger

---

[1] The district court, for example, relied upon *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752, 754 (11th Cir. 1996) (Pizza Hut manager not "higher management" for purpose of notice of sexual harassment of kitchen workers by delivery driver and *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988) ("employee can show that employer had knowledge of the harassment by proving that she complained to higher management of the problem...") (complaint to general manager of car dealership sufficient).

[2] *Young v. Bayer Corp.*, 123 F. 3d 672, 675 (7th Cir. 1997)(reversing summary judgment on grounds that plant worker's notice to department head was sufficient notice to the company).

[3] *See Bonenberger v. Plymouth Township*, 132 F.3d 20, 27 & n. 7 (3rd Cir. 1997)("[s]ince, under the police department's own policy, Sergeants Galetti and Carbo were responsible for investigating complaints of sexual harassment...their failure to take prompt and appropriate remedial action, if proven at trial, gives rise to departmental liability")(citing to *Young*); *Torres v. Pisano*, 116 F.3d 625, 637 (2nd Cir. 1997)(supervisor's "knowledge could potentially have been imputed to NYU on the ground that Pisano had a duty to inform the company of the harassment").

operations as "provid[ing] little help" because of "the closeness and the informal operation of V&M," App. at 15a, the district court went on to analyze a workplace that had an average of 60 employees and one hiring-and-firing boss, i.e., Mr. Nix. The district court stated that "[a]lthough Mr. Sutton would handle initial complaints regarding sexual harassment, Ms. Graff does not dispute that Mr. Nix instructed his female employees to report incidents of sexual harassment to him personally if reports to Mr. Sutton failed to ameliorate the conditions." App. at 15a.

The district court then held:

> The determination of who counts as higher management must turn not only on the size of the corporation, but on the degree to which the highest manager in the corporation delegates the role of ombudsman to subordinates. The "higher manager" inquiry evidently is calculated to place liability on the corporation when a person in the corporation who could have terminated the inappropriate behavior learned of the behavior but failed to bring it to an end. In this case, two factors compel the conclusion that Mr. Hutton was not "higher management." First, because he lacked the authority to fire the Sargent brothers, he had limited power to bring an end to their alleged misbehavior. Stern reprimands are poor substitutes for pink slips. Second, Ms. Graff herself seemed to recognize that her complain ultimately should be lodged with Mr. Nix himself. After complaining three times to Mr. Sutton, she went to Mr. Nix and complained of her mistreatment as Mr. Nix had instructed her to do. Under the circumstances, the Court holds that, as

a matter of law, Mr. Sutton was not higher management for purposes of imputing notice to V&M.[9]

---

9. If Mr. Sutton was not higher management, Dave Sargent, a foreman, certainly was not higher management. Also, at oral argument counsel for the plaintiff suggested that Ms. Graff had addressed her complaint to Mr. Nix's daughter during a telephone conversation, and that this should count as notice of the corporation. The record, however, does not indicate that Mr. Nix's daughter was employed by V&M in any capacity that would make her "higher management" of the corporation, and the mere fact that she was related to Mr. Nix cannot make up for this deficiency.

App. at 15a-16a & n. 9.

By affirming the district court, the court of appeals uses the "higher management" theory to cloak a small-to-medium-sized company[4] with a "Mom-and-Pop store" exemption to traditional notions of negligence, i.e., excusing it from a finding of notice when the company either knew or should have known of a discriminatory environment. At the same time, it imposes on small-business employees the formality of identifying and communicating to a corporate-level official.

The decision below extends the Eleventh Circuit's

---

4 Some 15.7 million of the nation's 86.9 million employees, 18 per cent of all those persons employed, work for 403,000 companies employing between 20 and 99 persons. BUREAU OF THE CENSUS, U.S. DEP'T. OF COMM., 1992 ENTERPRISE STATISTICS, COMPANY SUMMARY 9 (1997).

"higher management" doctrine to its logical end. This go-to-the-top requirement thwarts the remedial purpose of Title VII, i.e., "'"to strike at the entire spectrum of disparate treatment of men and women" in employment,' which includes requiring people to work in a discriminatorily hostile or abusive environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). It places upon the victim of discrimination and/or harassment the onus of finding the top person in the company and complaining only to that person, as opposed to placing the burden on the employer to enforce, from the top down, a zero-tolerance approach to employment discrimination in the form of sexual harassment.[5]

The rule clearly articulated in *Young*, and suggested by the *Bonenberger* and *Pisano* courts, on the other hand, is consistent with both congressional policy and the policy guidance issued by the Equal Employment Opportunity Commission calling for an "effective preventative program" and prompt, thorough investigation. EEOC Policy Guidance on Sexual Harassment, 8 Fair Employment Practices Manual (BNA), at 405:6699-6700. By recognizing that notice to the employer occurs as soon as discriminatory behavior is communicated "to someone who could reasonably be expected to refer the complaint up the ladder to the employee authorized to act on it," *Young*, 123 F. 3d at 675, the Court would restore to Title VII cases involving discrimination by co-workers the same kind of knew-or-should-have-known test that governs every other kind of

---

[5] *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683 (Spring 1998)(arguing for a broader, more discrimination-oriented understanding of sexual harassment than the "sexual desire-dominance paradigm" that has characterized such cases in the past).

negligence. The Court thus would eliminate the artificial barriers to relief that are erected by the highest-management standard adopted by the district court and approved by the Court of Appeals for the Eleventh Circuit.

CONCLUSION

Based on the authorities cited and the argument presented, the Court should grant the petition for a writ of certiorari.[6]

Respectfully submitted,

WILLIAM R. AMLONG
Counsel of Record
JENNIFER J. ATOR
AMLONG & AMLONG, P.A.
Attorneys for Petitioner
500 Northeast Fourth Street
Second Floor
Fort Lauderdale, Florida 33301
(954) 462-1983

---

[6] At the time this petition is being filed, the Court is considering *Faragher v. City of Boca Raton*, Case No. 97-282, in which the Questions Presented include the following: "May a fact-finder infer notice to an employer of hostile-environment sexual harassment... through actual notice to an intermediate supervisor, who reports it no further?" Should the Court answer that question affirmatively, then the Court could vacate the opinion of the Court of Appeals below and remand this matter for further consideration in light of its holding in *Faragher*.